

Where a claimant, thought by the employer to have engaged in misconduct, was placed on indefinite investigatory suspension while the employer confirmed that misconduct did occur, and then was terminated when the employer had determined to its satisfaction that the claimant had engaged in the wrongdoing he was suspected of, the period of time when the claimant was suspended must not be analyzed as a G.L. c. 151A, sec. 25(f), disciplinary suspension. Rather, it is a G.L. c. 151A, sec. 25(e)(2), separation which occurred at the date the employee was suspended.



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Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner of the Division of Unemployment Assistance (DUA), to grant unemployment benefits during a three-week suspension, but denying benefits upon the claimant's discharge by the employer. We review, pursuant to our authority under G.L. c. 151A, § 41, affirm the denial of benefits after the claimant's discharge, and reverse the grant of benefits during the claimant's suspension.

The claimant was suspended from his position with the employer on February 13, 2009. He was discharged on March 16, 2009. He filed a claim for unemployment benefits with the DUA and was awarded benefits in a determination issued on May 26, 2009. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner reversed the agency's initial determination and denied benefits for the period after the claimant's discharge, but affirmed the award of benefits during the three weeks of the claimant's suspension, in a decision rendered on July 13, 2009.

Benefits were denied after the review examiner determined that the claimant knowingly violated a reasonable and uniformly enforced rule or policy of the employer and, thus, was disqualified, under G.L. c. 151A, § 25(e)(2). However, the review examiner also determined that the claimant was entitled to benefits for the period of time in which he had been indefinitely suspended, pursuant to G.L. c. 151A, § 25(f), and 430 CMR 4.04(4). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal, we accepted the claimant's request for review. Our decision is based upon our review of the entire record.

The issues on appeal are: whether the claimant was discharged for intentional misconduct or a knowing violation of a reasonable and uniformly enforced rule or policy of the employer when his employment was terminated for misconduct on March 16, 2009; and whether the claimant was eligible for benefits while he was indefinitely suspended prior to his discharge.

Findings of Fact

The review examiner's findings of fact are set forth below in their entirety:

1. The claimant had been employed as the assistant director of an after-school program for the instant employer and coached a girl's basketball team. The claimant had been employed with the instant employer beginning September 2001.
2. The claimant was arrested at his home on 2/12/09 and arraigned on 2/13/09 for charges filed against him on two counts of rape of a child by force and one count of indecent assault and battery on a child under the age of 14.
3. The charges were publicized in the newspaper and detectives seized videos and images from the claimant's home that highly suggested that the abuse occurred on the employer's premises.
4. The Department of Early Education and Care conducted an independent investigation. An investigative report, dated 4/13/09, included investigations made with the [County] DA's office and the [City X] and [City Y] Police Departments. The report contained details from the police investigation.
5. Evidence recovered at the claimant's home strongly suggested that the claimant used hidden cameras within the child care program to film young girls changing their clothes and using the bathroom. Detectives were able to identify specific areas and rooms within the specific school site where there was videotaping of acts of sexual abuse of young children.
6. The employer initially notified the claimant that he was suspended without pay from their organization pending the resolution of his criminal case. A letter to that effect was sent to the claimant dated 2/13/09.
7. The claimant's employment status changed on March 16, 2009, when he was notified in writing that he was terminated.
8. The claimant was terminated because there was a strong suggestion to show that the claimant violated the employer's code of conduct which prohibited the sexual abuse of children.

9. The claimant knew that violations against the code of conduct were grounds for termination of employment because he signed the code of conduct policy on 9/29/01.

Ruling of the Board

The Board adopts the review examiner's findings of fact. In so doing, we deem them to be supported by substantial and credible evidence. However, we reach our own conclusions of law, as are discussed below.

With regard to her decision to deny benefits following the claimant's discharge, the review examiner properly analyzed the claimant's separation under G.L. c. 151A, § 25(e)(2), which provides, in pertinent part, as follows:

No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter for... the period of unemployment next ensuing ... after the individual has left work...(2) by discharge shown to the satisfaction of the commissioner by substantial and credible evidence to be attributable to deliberate misconduct in wilful disregard of the employing unit's interest, or to a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, provided that such violation is not shown to be as a result of the employee's incompetence...

Under G.L. c. 151A, § 25(e)(2), it is the employer's burden to establish that the claimant was discharged for a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, or for deliberate misconduct in wilful disregard of the employer's interest. We affirm the review examiner's conclusion that the employer has met its burden as to the claimant's discharge.

The review examiner found that the employer had a Code of Conduct prohibiting child abuse and neglect, and also had corresponding Child Abuse Reporting Procedures. The employer's Code of Conduct requires suspension for all volunteers or staff upon "first report or probable cause to believe that child abuse has occurred," and does not permit reinstatement until after all allegations have been cleared to the employer's satisfaction. These policies and procedures are reasonable. They help ensure the protection of children under the employer's care, and it enables the employer to comply with state laws requiring employers who work with children to report and investigate suspected cases of child abuse. The claimant was aware of these policies and procedures because he signed for them at hire.

The review examiner's conclusion that the claimant violated the employer's Code of Conduct was supported by substantial and credible evidence. The review examiner found that the physical evidence recovered at the claimant's home "strongly suggested" the claimant used hidden cameras to film young girls in the child care program changing their clothes and using the bathroom, and that detectives had been able to identify specific areas and rooms at the employer's premises where videotaping had taken place. The review examiner's findings were

corroborated by an Investigation Report (the "Investigation Report") from the Commonwealth's Department of Early Education and Care (DEEC), which had been prepared by a DEEC investigator who interviewed staff and children at the employer's site, and who also had interactive contacts with representatives from the [County] District Attorney's office and two police departments. See Hearings Exhibit 11. The claimant did not testify at the hearing on his own behalf, so the employer's testimony and evidence are undisputed.

Such evidence, although hearsay, is both admissible here and of substantial probative value. The Supreme Judicial Court has made it clear that in an administrative hearing, "Substantial evidence may be based on hearsay alone if that hearsay has 'indicia of reliability.'" Covell v. Dept. of Social Services, 439 Mass. 766, 786 (2003), *quoting Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n.*, 401 Mass. 526, 530 (1988). See also Doe v. Sex Offender Registry Board, 70 Mass. App. Ct. 309 (2007).

The Investigation Report was compiled after the investigator personally made six visits to the employer's site, attended two separate off-site interviews of children who had been in the employer's care, and conducted additional telephone interviews of parents of children in the employer's program, as well as employees of the employer and a subcontractor. The investigator concluded that the claimant sexually abused children in the employer's care. The Investigative Report contains sufficient indicia of reliability to support disqualification from benefits. We, therefore, conclude as a matter of law that the employer discharged the claimant for a knowing violation of its reasonable and uniformly enforced Code of Conduct.

However, the review examiner also concluded that the claimant was eligible for benefits during the three weeks for which he was suspended prior to discharge, pursuant to G.L. c. 151A, § 25(f), which provides, in pertinent part, as follows:

No waiting period shall be allowed and no benefits shall be paid to an individual pursuant to this chapter...(f) For the duration of any period, but in no case more than ten weeks, for which he has been suspended from his work by his employing unit as discipline for violation of established rules or regulations of the employing unit.

Application of G.L. c. 151A, § 25(f), is further explained by regulation; 430 CMR 4.04(4) provides, in pertinent part, as follows:

A claimant who has been suspended from his work by his employing unit as discipline for breaking established rules and regulations of his employing unit shall be disqualified from serving a waiting period or receiving benefits for the duration of the period for which he or she has been suspended, but in no case more than ten weeks, provided it is established to the satisfaction of the Commissioner that such rules or regulations are published or established by custom and are generally known to all employees of the employing unit, that such suspension was for a fixed period of time as provided in such rules or regulations, and that a claimant has the right to return to his employment with the employing unit if work is available at the end of the period of suspension.

The review examiner concluded that because the claimant's suspension was for an indefinite period, he was eligible for unemployment benefits for the three weeks during which he was suspended prior to his discharge. We disagree.

We draw a distinction between suspensions imposed while investigations are pending and suspensions meted out as punishment for disciplinary infractions. Where a claimant is suspended without pay pending discharge while an employer is still investigating whether or not the claimant engaged in the alleged wrongdoing, then the claimant's situation should not be analyzed under G.L. c. 151A, § 25(f). In effect, the claimant in this situation has been separated as of the date of his suspension. See Dir. of Employment Security v. Fitzgerald, 382 Mass. 159 (1980) (claimant whom employer characterized as being on a "leave of absence" was in reality separated, because although she was willing and able to work, the employer would not let her do so). If the investigation absolves the claimant of wrongdoing, then the claimant will be eligible for unemployment benefits during the period he was suspended, provided he had applied and certified for them during the period of investigative suspension. This is in harmony with the statutory purpose to pay benefits to unemployed workers who are out of work through no fault of their own.

If, however, the investigation subsequently concludes that a suspended claimant did engage in wrongful conduct and the employer fires him as a result, then the date of suspension is effectively the claimant's date of separation.

Under these circumstances, the claimant's eligibility for benefits during the entire period must be examined pursuant to G.L. c. 151A, § 25(e)(2).

Here, the claimant did not return to work. After the investigation, he was discharged for intentionally violating the employer's code of conduct. Because the findings of fact support the allegations of wrongful conduct, he is ineligible to collect unemployment benefits.

We, therefore, conclude as a matter of law that the claimant was not entitled to any benefits under G.L. c. 151A, § 25(e)(2).

We affirm the portion of the review examiner's decision denying benefits after the claimant's discharge and reverse the portion of the decision granting benefits while the claimant was under suspension. The claimant is denied benefits for the week ending February 28, 2009 and for subsequent weeks, until such time as he has had eight weeks of work and in each of those weeks has earned an amount equivalent to or in excess of his weekly benefit amount.

BOSTON, MASSACHUSETTS

DATE OF MAILING - January 11, 2011

/s/

John A. King, Esq.
Chairman

/s/

Stephen M. Linsky, Esq.
Member

Member Sandor J. Zapolin declines to sign the majority opinion.

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS DISTRICT COURT
(See Section 42, Chapter 151A, General Laws Enclosed)**

LAST DAY TO FILE AN APPEAL IN COURT – February 10, 2011

jpc/ab

Last Updated (Monday, 02 May 2011)